COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO.: 2015-SC-000256

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, **APPELLANT,**

On Discretionary Review from the Kentucky Court of Appeals
Action No. 2013-CA-001501

v. **and**

On Appeal from the Franklin Circuit Court
Action No. 12-CI-00962

ESTILL COUNTY FISCAL COURT,

and

SECRETARY OF LABOR,
COMMONWEALTH OF KENTUCKY, **APPELLEES.**

Brief for Appellee, Secretary of Labor, Commonwealth of Kentucky

Submitted by:

Michael G. Swansburg, Jr.
OFFICE OF GENERAL COUNSEL
KENTUCKY LABOR CABINET
1047 U.S. Highway 127 South
Suite 4
Frankfort, Kentucky 40601

CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that a copy of this brief was served upon the following named individual via hand-delivery on April 5, 2016: Susan Stokley Clary, Clerk, Kentucky Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky, 40601. The undersigned does hereby further certify that a copy of this brief was served upon the following counsel of record via U.S. mail, postage pre-paid, on April 5, 2016: Frederick G. Huggins, Esq., Kentucky Occupational Safety and Health Review Commission, #4 Millcreek Park, Frankfort, Kentucky, 40601; D. Barry Stilz, Esq., and Adrian M. Mendiondo, Esq., Kinkead & Stilz, 301 East Main Street, Suite 800, Lexington, Kentucky, 40507; and Rodney G. Davis, Esq., Davis Law, P.S.C., 133 Main Street, Irvine, Kentucky, 40336.

Michael G. Swansburg, Jr.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(d)(i), Appellee declines oral argument. This matter turns on an interpretation of a Kentucky regulation that was subsequently amended to comport with the interpretation. Accordingly, the Appellee does not believe this Court needs to clarify the parties' written submissions with direct questions to counsel.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This appeal[1] involves a judgment entered against Appellant Kentucky Occupational Safety and Health Review Commission (the "Commission") in favor of Appellee Estill County Fiscal Court (the "Fiscal Court") as to the Commission's finding that an employee-to-employer health complaint constituted "protected activity" under KRS 338.121(3)(a). Though the Secretary agrees with the Commission that the evidence of record shows the Fiscal Court refused to re-employ an employee who complained to her supervisor about smoke in her work place, the Secretary nevertheless acknowledges the position of the Kentucky Court of Appeals and sees no reason to disturb its opinion.

A. The Court of Appeals' Decision

On February 27, 2015, a panel of the Kentucky Court of Appeals determined that the Commission committed an arbitrary agency action when the Commission upheld a hearing officer's finding that an employee-to-employer health complaint constituted "protected activity" under KRS 338.121(3)(a). (*See* Op. 4-5 (cited as "Appendix 4" in Appellant's brief)). Specifically, the Court of Appeals found that although federal regulation, 29 C.F.R. § 1977.9, interpreting federal law, 29 U.S.C. § 660(c)(1), included employee-to-employer complaints as "protected activity," Kentucky had promulgated no similar position in its own occupational safety and health regulations. (*Id.* at 4). Moreover, the Court of Appeals held that the authority to amend Kentucky's regulations and include such complaints rested solely with the Kentucky Occupational Safety and Health Standards Board (the "Board) pursuant to KRS 338.051(3). (*Id.* at 10). Thus, the

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[1] Appellee Secretary of Labor, Commonwealth of Kentucky, timely filed a separate Motion for Discretionary Review, which this Court granted on December 10, 2015, and docketed as 2015-SC-00021. The Secretary, however, moved this Court to dismiss its appeal on February 8, 2016, which this Court granted on March 16, 2016.

Court of Appeals concluded, when the Commission relied upon the federal regulation in upholding the hearing officer's finding, it effectively usurped the statutory authority of the Board and drafted a new regulation into Kentucky's occupational safety and health scheme. (*Id.* at 14).

B. The Parties Seek Discretionary Review

Pursuant to CR 76.20, the Secretary filed a timely Motion for Discretionary Review with this Court on May 19, 2015. (Ex. 1, Mot. for Discretionary Review). In that Motion, the Secretary noted that the Board had drafted an amendment to 803 KAR 2:250 to clarify that employee-to-employer complaints constituted "protected activity" under KRS 338.121(3)(a) and expected to file that regulatory proposal before June 15, 2015, with the Kentucky Legislative Research Commission. (*Id.* at 5 n.2). Two days later, on May 21, 2015, the Commission filed its Motion for Discretionary Review with this Court. (Ex. 2, Mot. for Discretionary Review).

C. Changes to Kentucky's Occupational Safety and Health Regulations Go Into Effect

On October 2, 2015, the amendments to 803 KAR 2:250 proposed before the Kentucky Legislative Research Commission became effective. (*See generally* Ex. 3, 803 KAR 2:250). In particular, the "Definitions" section of the regulation provides that a "Complaint" means "any oral or written communication related to an occupational safety and health concern made by an employee to *an employer*, governmental agency, or made to the commissioner or the commissioner's designee." (*Id.* 803 KAR 2:250 § 1(3) (emphasis added)). Two months later, on December 10, 2015, this Court granted discretionary review. As noted above, however, and on motion of the Secretary, this Court dismissed the case filed by the Secretary on March 16, 2016.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS APPEAL FOR LACK OF A SPECIAL REASON TO CONSIDER IT

Kentucky Rule of Civil Procedure 76.20(1) states that discretionary review "is a matter of judicial discretion and will be granted only when there are special reasons for it." *See also Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 419 (Ky. 2005) ("The granting of discretionary review is, as the name indicates, a matter of discretion and 'will be granted only when there are special reasons for it.'").

At the time the Commission filed its Motion for Discretionary Review, 803 KAR 2:250, which encompasses the process for bringing claims of discrimination under Kentucky's occupational safety and health administrative scheme, contained no reference to the type of employee-to-employer complaint made by Ms. Mary Smith, the complainant in the underlying case. *See* Ex. 1, Mot. for Discretionary Review 5 n.2 (explaining to the Court that the Secretary expected proposed amendments to the regulations to be submitted by June 15, 2015). That deficiency was thereafter cured through the implementation of new regulations, which effectively included employee-to-employer grievances as a type of "complaint" which would constitute "protected activity" for discrimination complaints. *See* 803 KAR 2:250 § 1(3). Thus, it is the view of the Secretary that any opinion from this Court in the instant matter will be limited only to the case of Ms. Smith, as any future complaint of this type will undoubtedly find refuge in the newly amended regulation. Indeed, reviewing and adjudicating the merits of Ms. Smith's case alone is hardly a "special reason" calling for this Court's attention, particularly when similar predicaments are unlikely in the future as a result of the Board's

decision to amend the regulation. In short, the Court should dismiss this case, as the circumstances for which discretionary review was previously granted no longer exist.

II. SHOULD THE COURT CONSIDER THIS CASE, IT SHOULD DISMISS THE COMMISSION'S ARGUMENTS RELATED TO THE STATUTORY AUTHORITY OF THE SECRETARY

Assuming, *arguendo*, this Court chooses not to dismiss this appeal due to a lack of any special reasons, it should disregard from its analysis of this matter the Commission's uninvited attempt to define the scope of the Secretary's authority in its brief. To be sure, Kentucky statute empowers the Secretary, upon complaint, to "prosecute any violation of any of the provisions of any law which it is his or her duty to administer or enforce." KRS 336.050(4).

In its brief, however, the Commission argues that each time the Secretary issues a citation "he makes policy and interprets the standards and statutes he enforces." Commission Br. 20 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). By issuing that citation, the Commission continues, the Secretary is acting in "a legally superior method of interpretation when compared to an interpretive regulation." *Id.* at 22 (citing *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 156-57 (1991)).

Yet, *Martin* does not stand for the hierarchical proposition of citations versus regulations now championed by the Commission. There, the U.S. Supreme Court held that "the Secretary's litigating position before the Commission [triggered by citation] is *as much* an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." 499 U.S. at 157 (emphasis added). In other words, the Secretary's interpretation of an occupational safety and health statute, in the

absence of any controlling regulation, is entitled to the same level of judicial deference—and scrutiny—as the Secretary's implementation of a new regulation. This is hardly the same as saying the issuance of a citation *outweighs* the proclamation of interpretive regulation, a position the Court arguably cautioned against when it stated that "the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties . . . and on other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers." *Martin*, 499 U.S. at 158 (citations omitted).

Regardless, the Commission's commentary as to the scope of the Secretary's authority is improper in this venue as it was never raised or adjudicated in the Court of Appeals. *See Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011) ("'[A]ppellant is precluded from raising that question on appeal because it was not raised or relied upon in the court below. It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.'" (quoting *Combs v. Knott County Fiscal Court*, 141 S.W.2d 859, 860 (1940))). This Court should, therefore, dismiss this portion of the Commission's brief outright.

III. SHOULD THE COURT CONSIDER THIS CASE, IT SHOULD AFFIRM THE COURT OF APPEALS

To be clear, the Court of Appeals in this case found that the Commissioner of Workplace Standards "and his or her representatives serve at the direction of the Secretary of Labor, KRS 338.015, and may conduct investigations and issue citations." Op. 10 (citation omitted). The Commissioner, the Court of Appeals added, "acts as KOSHA's prosecutor, charged with enforcing regulations promulgated by the Board." *Id.* However, the Court of Appeals, concluded, "like any prosecutor, the Commissioner

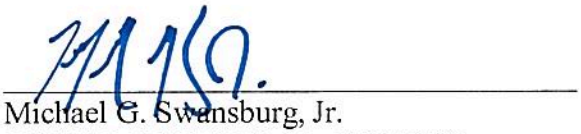
may not issue citations based on violations of non-existent rules." *Id.* Upon further reflection, the Secretary does not dispute this characterization.

To be clear, the Secretary, by way of the Commissioner, issued a citation against the Fiscal Court on the basis that the evidence before him suggested Ms. Smith was not called back to work at the Fiscal Court due to her complaining about an occupational safety and health concern to her supervisor. The Commission upheld that citation. The Court of Appeals, however, overturned the Commission's decision, holding that the type of complaint made by Ms. Smith was not provided for in Kentucky's regulations. After reviewing the opinion of the Court of Appeals, the Board promulgated new rules and included such complaints, which the Court of Appeals had already acknowledged as both the proper authority and process. Those regulations became effective on October 2, 2015. Thus, the Secretary sees no purpose in having this Court upset the apple cart, particularly when the threshold issue prompting this litigation—*i.e.*, whether employee-to-employer complaints constitute "protected activity" under Kentucky regulation—has been effectively addressed through legitimate lawmaking avenues.

CONCLUSION

For all these reasons, the Secretary respectfully asks the Court to withdraw discretionary review of this case and issue an order instructing the Court of Appeals not to publish its opinion below, or, alternatively, to affirm the Court of Appeals' decision.

Respectfully submitted,



Michael G. Swansburg, Jr.
OFFICE OF GENERAL COUNSEL
KENTUCKY LABOR CABINET
1047 U.S. Highway 127 South
Suite 4
Frankfort, Kentucky 40601

Counsel for Appellee,
Secretary of Labor,
Commonwealth of Kentucky